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ERISA Section 510 Claims: No Right to a Jury Trial Can Be Found

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I. INTRODUCTION

The Employee Retirement Income Security Act of 1974 (ERISA)[1] was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans."[2] Both employer-provided pension and welfare benefits are protected under the Act.[3] As part of ERISA's comprehensive benefit protections, section 510 protects an employee against an employer's interference with the attainment of rights under a benefit plan or the Act as well as an employer's retaliation for exercising rights under a benefit plan or the Act.[4] Section 510 provides:

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1. 29 U.S.C. §§ 1001-1461 (1988).
2. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983).
3. *See* 29 U.S.C. §§ 1002(1)-(2), 1003 (1988).
4. Employee Retirement Income Security Act of 1974 § 510, 29 U.S.C. § 1140 (1988).

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, [or] this subchapter, . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, [or] this subchapter . . . . It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter . . . .[5]

The section 502[6] civil enforcement provisions are applicable when a section 510 claim is brought.

The right to jury trial is a frequently litigated issue in ERISA actions.[7] In fact, litigants have continued to rehash arguments concerning the existence of a right to trial by jury on section 510 claims since the statute was enacted. Until 1992, courts regularly disagreed in their results regarding whether and when the right arises.[8] More re-

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5. *Id.*
6. 29 U.S.C. § 1132 (1988 & Supp. V 1993).
7. *See, e.g.*, Spinelli v. Gaughan, 12 F.3d 853 (9th Cir. 1993); Blake v. Unionmutual Stock Life Ins. Co. of Am., 906 F.2d 1525 (11th Cir. 1990); Cox v. Keystone Carbon Co., 894 F.2d 647 (3d Cir.) (Cox II), *cert. denied*, 498 U.S. 811 (1990); Cox v. Keystone Carbon Co., 861 F.2d 390 (3d Cir. 1988) (Cox I); Katsaros v. Cody, 744 F.2d 270 (2d Cir.), *cert. denied*, 469 U.S. 1072 (1984); *In re* Vorpahl, 695 F.2d 318 (8th Cir. 1982); Calamia v. Spivey, 632 F.2d 1235 (5th Cir. 1980); Wardle v. Central States, S.E. & S.W. Areas Pension Fund, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); Zimmerman v. Sloss Equip., Inc., 835 F. Supp. 1283 (D. Kan. 1993); Pickering v. USX Corp., 809 F. Supp. 1501 (D. Utah 1992); Sprague v. General Motors Corp., 804 F. Supp. 931 (E.D. Mich. 1992); Abels v. Kaiser Aluminum & Chem. Corp., 803 F. Supp. 1151 (S.D. W. Va. 1992); Pegg v. General Motors Corp., 793 F. Supp. 284 (D. Kan. 1992); Vicinanzo v. Brunschwig & Fils, Inc., 739 F. Supp. 882 (S.D.N.Y. 1990); Gangitano v. NN Investors Life Ins. Co., 733 F. Supp. 342 (S.D. Fla. 1990); Haeffele v. Hercules Inc., 703 F. Supp. 326 (D. Del. 1989); Chastain v. Delta Air Lines, Inc., 496 F. Supp. 979 (N.D. Ga. 1980); Stamps v. Mich. Teamsters Joint Council No. 43, 431 F. Supp. 745 (E.D. Mich. 1977).
8. For examples of cases holding that no right to a jury trial attaches, see Spinelli v. Gaughan, 12 F.3d 853 (9th Cir. 1993); Blake v. Unionmutual Stock Life Ins. Co. of Am., 906 F.2d 1525 (11th Cir. 1990); *In re* Vorpahl, 695 F.2d 318 (8th Cir. 1982); Calamia v. Spivey, 632 F.2d 1235 (5th Cir. 1980); Wardle v. Central States, S.E. & S.W. Areas Pension Fund, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); Cox v. Keystone Carbon Co., 894 F.2d 647 (3d Cir.) (Cox II), *cert. denied*, 498 U.S. 811 (1990); Pickering v. USX Corp., 809 F. Supp. 1501 (D. Utah 1992); Haeffele v. Hercules, Inc., 703 F. Supp. 326 (D. Del. 1989); Chastain v. Delta Air Lines, Inc., 496 F. Supp. 979 (N.D. Ga. 1980); Tucker v. Montgomery Ward & Co., No. 86-C-9734, 1987 U.S. Dist. LEXIS 6737 (N.D. Ill. July 16, 1987); Brill v. Central States, S.E. & S.W. Areas Pension Fund, No. 82-C-7973, 1986 U.S. Dist. LEXIS (N.D. Ill. July 31, 1986).

   For examples of cases holding that a right to jury trial does exist, see International Union v. Midland Steel Prod. Co., 771 F. Supp. 860 (N.D. Ohio 1991); Blue Cross & Blue Shield v. Lewis, 753 F. Supp. 345 (N.D. Ala. 1990); Weber v. Jacobs Mfg. Co., 751 F. Supp. 21 (D. Conn. 1990); Vicinanzo v. Bruschwig & Fils, Inc., 739 F. Supp. 882 (S.D.N.Y. 1990); Gangitano v. N.N. Investors Life Ins. Co., 733

cently, however, most courts addressing the issue seem to be following a trend away from finding the existence of the right.[9] The Supreme Court has provided no direct guidance on the issue.[10]

This Article analyzes whether a right to jury trial exists for an ERISA section 510 interference and retaliation action. The Article first focuses on whether Congress explicitly or implicitly provided the right under the statute itself, and concludes that no right is explicitly provided. In addition, a plain reading of ERISA enforcement sections 502(a)(1)(B) and 502(a)(3) and an analysis of the legislative history indicate that Congress intended for section 510 actions to be enforced only under section 502(a)(3) and that an implicit right to a jury trial was not provided in that section. Because no explicit or implicit statutory right exists, the Article goes on to analyze the issue under the United States Supreme's Court's *Ross v. Bernhard*[11] Seventh Amendment right to jury trial test and highlights the most recent cases addressing this issue. The Article ultimately concludes that no right to a jury trial attaches under the Seventh Amendment because a plain reading of enforcement section 502(a)(3) indicates that only equitable remedies are available to enforce a section 510 claim.

II. STATUTORY CONSTRUCTION

The United States Supreme Court has held that a court should "first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided."[12] Courts must examine ERISA's language to determine whether Congress explicitly provided for the right to a jury trial. Then, if the right was not explicitly provided, courts must review the statutory language and legislative history for clues regarding Congress' intent to include an implicit right to jury trial.

F. Supp. 342 (S.D. Fla. 1990); Stamps v. Michigan Teamsters Joint Council No. 43, 431 F. Supp. 745 (E.D. Mich. 1977).

For opinions that have been interpreted to allow a jury trial depending on the remedy requested, see, e.g., Katsaros v. Cody, 744 F.2d 270 (2d Cir.), *cert. denied*, 469 U.S. 1072 (1984); Steeples v. Time Ins. Co., 139 F.R.D. 688 (N.D. Okla. 1991).

9. *See, e.g.*, Spinelli v. Gaughan, 12 F.3d 853 (9th Cir. 1993); Zimmerman v. Sloss Equip., Inc., 835 F. Supp. 1283 (D. Kan. 1993).

10. In fact, the Third and Ninth Circuits are the only circuit courts to directly address the issue in the context of an ERISA § 510 claim. Spinelli v. Gaughan, 12 F.3d 853 (9th Cir. 1993); Cox v. Keystone Carbon Co., 894 F.2d 647 (3d Cir.) (Cox II), *cert. denied*, 498 U.S. 811 (1990); Cox v. Keystone Carbon Co., 861 F.2d 390 (3d Cir. 1988) (Cox I).

11. 396 U.S. 531 (1970).

12. *See* Chauffeurs, Teamsters & Helpers, Local 391 v. Terry, 494 U.S. 558, 565 n.3 (1990) (quoting Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974) (quoting United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971), *reh'g denied*, 403 U.S. 924 (1971))).

A. ERISA's Explicit Language

The right to a jury trial is explicitly provided when a statute's language actually states that such a right is available. For example, Congress recently provided an explicit right to a jury trial when a plaintiff requests compensatory and punitive damages in a Title VII action.[13] The Civil Rights Act of 1991 specifically states that "any party may demand a *trial by jury*"[14] when the complaining party seeks compensatory or punitive damages.[15]

No such explicit language exists in ERISA. Although a number of section 502(a) subsections are available to enforce an ERISA claim, only subsections 502(a)(1)(B) and 502(a)(3) are potentially appropriate for the enforcement of a section 510 action.[16] Subsection 502(a)(1)(B) provides that an employee benefit plan participant may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."[17] Subsection 502(a)(3) provides that a participant may "enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or . . . obtain other equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."[18] Clearly, neither of these subsections provides an explicit right to jury trial; they merely provide a cause of action to plan participants or beneficiaries. Courts, therefore, have repeatedly faced the question of whether an implicit right exists.

B. An Implicit Right

Whether Congress implicitly provided a right to jury trial under ERISA is a much more subjective and controversial inquiry than determining whether the right was explicitly provided. Although the

13. Civil Rights Act of 1991, § 102, 42 U.S.C. § 1981a(c)(1) (Supp. V 1993).
14. *Id.* (emphasis added).
15. *Id. See also* Age Discrimination in Employment Act, 29 U.S.C. § 626(c)(2) (1988) (providing that "a person shall be entitled to a *trial by jury* of any issue of fact . . . regardless of whether equitable relief is sought . . . .") (emphasis added).
16. Section 502(a)(1)(A) applies only when an administrator fails to supply information requested by a participant or beneficiary or fails to file complete annual reports. 29 U.S.C. § 1132(a)(1)(A),(c) (1988 & Supp. V 1993). Subsection 502(a)(2) applies only when the case involves liability for the breach of a fiduciary duty. *Id.* §§ 1109, 1132(a)(2). Subsection 502(a)(4) applies when the plan administrator fails to provide summary plan descriptions to each participant. *Id.* §§ 1025(c), 1132(a)(4). Subsections 502(a)(5)-(6) apply only when an action is brought by the Secretary. 29 U.S.C. § 1132(a)(5)-(6) (1988).

    None of these § 502(a) subsections are appropriate for an interference with benefits claim under § 510. Therefore, only subsections 502(a)(1)(B) and (a)(3) are potentially applicable.
17. 29 U.S.C. § 1132(a)(1)(B) (1988).
18. *Id.* § 1132(a)(3).

courts seem to agree that subsection 502(a)(3) is available for enforcement of a section 510 claim, they disagree about the applicability of subsection 502(a)(1)(B).[19] Further, those courts that believe subsection 502(a)(1)(B) may be used to enforce section 510 still disagree about Congress' intent to provide a right to jury trial under that section.[20] A plain reading and comparison of subsections 502(a)(1)(B) and 502(a)(3), however, support the conclusion that section 510 claims are enforceable only pursuant to subsection 502(a)(3).

Subsection 502(a)(1)(B) consistently refers to recovery of benefits or enforcement of rights provided by the *"terms of the plan."*[21] Section 3(3) defines the term "plan" as meaning an employee welfare benefit plan, employee pension benefit plan, and a plan that provides both

19. *See, e.g.*, Cox v. Keystone Carbon Co., 894 F.2d 647 (3d Cir.) (Cox II), *cert. denied*, 498 U.S. 811 (1990) (stating that either subsection may be used to enforce the right, but ultimately holding that no right to jury trial exists); International Union v. Midland Steel Prod. Co., 771 F. Supp. 860 (N.D. Ohio 1991) (maintaining that either subsection may be used to enforce the right and finding that a right to jury trial is implicit under the Act); Blue Cross & Blue Shield of Ala. v. Lewis, 753 F. Supp. 345 (N.D. Ala. 1990) (finding that either subsection may be used to enforce the right and holding that a right to jury trial attaches under the Seventh Amendment); Weber v. Jacobs Mfg. Co., 751 F. Supp. 21 (D. Conn. 1990) (stating that either subsection may be used to enforce the right and a right to jury trial exists under the Seventh Amendment); Vicinanzo v. Brunschwig & Fils, Inc., 739 F. Supp. 882 (S.D.N.Y. 1990) (claiming that either subsection may be used to enforce section 510 and Congress implicitly provided a right to jury trial); Tucker v. Montgomery Ward & Co., No. 86-C-9734, 1987 U.S. Dist. LEXIS 6737 (N.D. Ill. July 16, 1987) (limiting enforcement to subsection 502(a)(3) and concluding that no right to jury trial exists); Brill v. Central States, S.E. & S.W. Areas Pension Fund, No. 82-C-7973, 1986 U.S. Dist. LEXIS (N.D. Ill. July 31, 1986) (limiting enforcement to subsection 502(a)(3) and holding that no right to jury trial attaches).

20. For examples of cases holding that no right to a jury trial attaches under § 502(a)(1)(B), see Blake v. Unionmutual Stock Life Ins. Co. of Am., 906 F.2d 1525 (11th Cir. 1990); Cox v. Keystone Carbon Co., 894 F.2d 647 (3d Cir.), *cert. denied*, 498 U.S. 811 (1990); *In re* Vorpahl, 695 F.2d 318 (8th Cir. 1982); Calamia v. Spivey, 632 F.2d 1235 (5th Cir. 1980); Wardle v. Central States, S.E. & S.W. Areas Pension Fund, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); Pegg v. General Motors Corp., 793 F. Supp. 284 (D. Kan. 1992).

For examples of cases holding that a right to jury trial does exist, see International Union v. Midland Steel Prod. Co., 771 F. Supp. 860 (N.D. Ohio 1991); Blue Cross & Blue Shield of Ala. v. Lewis, 753 F. Supp. 345 (N.D. Ala. 1990); Weber v. Jacobs Mfg. Co., 751 F. Supp. 21 (D. Conn. 1990); Gangitano v. NN Investors Life Ins. Co., 733 F. Supp. 342 (S.D. Fla. 1990); Vicinanzo v. Bruschwig & Fils, Inc., 739 F. Supp. 882 (S.D.N.Y. 1990); Stamps v. Michigan Teamsters Joint Council No. 43, 431 F. Supp. 745 (E.D. Mich. 1977).

For an opinion that has been interpreted to allow a jury trial depending on the remedy requested, see, e.g., Katsaros v. Cody, 744 F.2d 270 (2d Cir.), *cert. denied*, 469 U.S. 1072 (1984).

21. 29 U.S.C. § 1132(a)(1)(B) (1988) (providing that the participant may "recover benefits due to him under the *"terms of the plan*, enforce his rights under *terms of the plan*, or clarify his right to future benefits under the *terms of the plan.*") (emphasis added).

welfare and pension benefits.[22] Subsection 502(a)(1)(B) does not include or refer to rights provided under the Act; it refers only to rights provided by the employee benefit plan itself.[23] Rights provided by a source other than the terms of the plan logically do not fall within subsection 502(a)(1)(B)'s reach. Therefore, rights provided only by the Act are not enforceable under subsection 502(a)(1)(B).

Subsection 502(a)(3), on the other hand, refers to acts or practices that "violate any provision of *this subchapter* or the terms of the plan" and to enforcement of rights provided under "*this subchapter* or the terms of the plan."[24] Subsection 502(a)(3), when read literally, is the only subsection available for enforcement because a violation of section 510 is more appropriately a violation of the Act—"this subchapter"—than the terms of a specific plan.[25]

In the 1990 *Ingersoll-Rand Co. v. McClendon*[26] decision, the United States Supreme Court analyzed whether ERISA section 510 preempted a state common-law claim for wrongful discharge. The Court primarily focused on the enforcement mechanism for a section 510 claim—subsection 502(a)(3).[27] The opinion did not discuss or even mention subsection 502(a)(1)(B) as a possible enforcement mechanism. Indeed, no language from subsection 502(a)(1)(B) is cited in the opinion.[28]

There are procedural differences between subsections 502(a)(1)(B) and 502(a)(3) that may provide further, important insight into Congress' intent. In subsection 502(e)(1), Congress conferred jurisdiction on both state and federal courts for claims brought under subsection 502(a)(1)(B), but it reserved jurisdiction to the federal courts for subsection 502(a)(3) suits.[29] ERISA's legislative history indicates that the decision to reserve jurisdiction was purposeful and deliberate. The decision was made because subsection 502(a)(3) suits enforce the

22. *Id.* § 1002(3).
23. *Id.* § 1132(a)(1)(B).
24. *Id.* § 1132(a)(3) (emphasis added).
25. *See also* Kross v. Western Elec. Co., 701 F.2d 1238, 1244 (7th Cir. 1983) (stating that § 502(a)(3) authorizes civil action for a violation of § 510); Grywczynski v. Shasta Beverages, Inc., 606 F. Supp. 61, 64 (N.D. Cal. 1984) (holding that intra-plan remedies are not adequate for violations of § 510).

    Section 510 states that "[t]he provisions of section 1132 of this title shall be applicable." 29 U.S.C. § 1140 (1988) (emphasis added). It might be argued that because the plural form of the term "provision" was used, Congress intended more than one of the § 502(a) enforcement subsections to be applicable. This argument, however, should fail because there are several "provisions" within § 502 that are "applicable" in the enforcement of a § 510 claim, including § 502(a)(3), (e), (f), and (g). Section 510 does not refer to the specific § 502(a) "provisions"; it refers to the more general and inclusive § 502 "provisions."
26. 498 U.S. 133 (1990).
27. *Id.* at 142-45.
28. *Id.*
29. 29 U.S.C. § 1132(e)(1) (1988).

substantive rights provided by ERISA,[30] and Congress was concerned that state courts unsympathetic to ERISA might undercut the federal minimum standards by narrowly construing the statute.[31] The careful thought and calculation that went into such a procedural decision supports the conclusion that Congress wanted section 510 claims to be enforced under subsection 502(a)(3) only. Further, when the United States Supreme Court in *McClendon* referred to subsection 502(a)(3) as the only enforcement mechanism for section 510 claims, it also held that subsection 502(e)(1) applied to the subsection 502(a)(3) enforcement process and limited section 510 claim jurisdiction to the federal courts.[32]

In addition, Congress limited the remedies available for violations of the Act itself—"this subchapter."[33] Subsection 502(a)(3) provides for an injunction or other forms of equitable relief.[34] Congress is aware of the difference between characterizing relief as legal or equitable.[35] It chose to provide equitable relief, and such equitable relief is traditionally awarded by the court, not a jury.

Because Congress specifically chose the words for subsection 502(a)(3) with full knowledge that claims arising under the Act—"this subchapter"[36]—would be brought only in federal court and only equitable relief would be available for the claims, Congress presumably was also aware that the right it created in section 510 would be enforced under subsection 502(a)(3). A comparison of the language used in subsections 502(a)(1)(B) and 502(a)(3) and ERISA's legislative history regarding the procedural differences between the subsections indicate that Congress did not intend to provide an implicit right to a jury trial for section 510 claims.[37]

Even though the language and legislative history do not appear to provide an implicit right, the United States District Court for the

30. *See* H.R. REP. No. 1280, 93d Cong., 2d Sess. *reprinted in* 1974 U.S.C.C.A.N. 5038, 5107; 120 CONG. REC. 29,933 (1974) (statement of Senator Williams).
31. *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1119-20 (1977).
32. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 145 (1990).
33. 29 U.S.C. § 1132(a)(3) (1988).
34. *Id.*
35. *See* Lorillard v. Pons, 434 U.S. 575, 583 (1978).
36. 29 U.S.C. § 1132(a)(3) (1988).
37. In both Brill v. Central States, S.E. & S.W. Areas Pension Fund, No. 82-C-7973, 1986 U.S. Dist. LEXIS (N.D. Ill. July 31, 1986), and Tucker v. Montgomery Ward & Co., No. 86-C-9734, 1987 U.S. Dist. LEXIS 6737, at *1-3 (N.D. Ill. July 16, 1987), the United States District Court for the Northern District of Illinois stated that the substantive rights established in § 510 are enforceable only pursuant to § 502(a)(3). Relying on ERISA's plain language and the Seventh Circuit's similar interpretation of the language and ultimate decision in Wardle v. Central States, S.E. & S.W. Areas Pension Fund, 627 F.2d 820, 829-30 (7th Cir. 1980), the court in *Tucker* found that Congress did not explicitly or implicitly provide a right to jury trial for a § 510 claim.

Northern District of Ohio came to a different conclusion in *International Union v. Midland Steel Products Co.*[38] The court decided that either subsection 502(a)(1)(B) or 502(a)(3) could be used to enforce section 510 claims,[39] and held that Congress implicitly provided a right to jury trial under ERISA.[40] The court reasoned that because section 510 claims are contractual in nature and legal remedies are available, subsection 502(a)(1)(B) could be used in addition to subsection 502(a)(3) to enforce section 510 claims.[41] In support of this conclusion, the court relied on dicta in the *Ingersoll-Rand Co. v. McClendon*[42] decision. It also looked at the Act's legislative history and decided that a reference to section 301 of the Labor Management Relations Act of 1947 (LMRA)[43] meant a right to jury trial was implied under ERISA.[44] Finally, the court supported this conclusion by relying on the 1990 United States Supreme Court decision in *Chauffeurs, Teamsters & Helpers, Local 391 v. Terry*[45]—a Seventh Amendment case.[46]

Although thorough, the court's analysis is not as compelling as it may seem at first glance. The court in *Midland* stated that "jury trials are not precluded by the language of the statute."[47] Stating that the right is not precluded or prohibited, however, does not necessarily mean that the right is affirmatively, or even implicitly, provided. Moreover, the court's reliance on *McClendon*, one reference to LMRA section 301, and *Terry* is suspect.

McClendon dealt with preemption of state law claims by ERISA section 510—not the right to a jury trial.[48] In *McClendon*, the plaintiff brought a wrongful discharge claim in Texas state court alleging that his employer fired him to avoid making contributions to his pension fund.[49] He sought compensatory and punitive damages under various tort and contract theories.[50] The district court granted the employer's motion for summary judgment based on Texas' adherence to the employment-at-will doctrine.[51] The Texas Supreme Court, however, reversed and concluded that a wrongful discharge claim was

38. 771 F. Supp. 860 (N.D. Ohio 1991).
39. *Id.* at 864.
40. *Id.*
41. *Id.*
42. 498 U.S. 133 (1990).
43. 29 U.S.C. § 185 (1988).
44. International Union v. Midland Steel Prod. Co., 771 F. Supp. 860, 863 (N.D. Ohio 1991).
45. 494 U.S. 558 (1990).
46. International Union v. Midland Steel Prod. Co., 771 F. Supp. 860, 865 (N.D. Ohio 1991).
47. *Id.*
48. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990).
49. *Id.* at 135.
50. *Id.*
51. *Id.*

supported by public policy because "the state has an interest in protecting employees' interests in pension plans."[52] The court stated that a plaintiff could recover in a Texas wrongful discharge action if "the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employer's pension fund."[53] Although federal courts had held that similar cases were preempted by ERISA, the Texas Supreme Court attempted to distinguish McClendon's action because instead of seeking lost pension benefits, he sought future lost wages, compensation for mental anguish, and punitive damages.[54] The United States Supreme Court granted certiorari because the *preemption issue* had divided both state and federal courts.[55]

The court in *Midland* focused on one sentence in the *McClendon* opinion to support its conclusion that plaintiffs could obtain legal relief under subsection 502(a)(1)(B) for a violation of section 510.[56] At the end of its opinion in *McClendon*, the Court stated "the relief requested here is well within the power of the federal courts to provide."[57] The court in *Midland* understood this to mean that federal courts could provide the exact remedy McClendon had requested—future lost wages, compensation for mental anguish, and punitive damages—in an ERISA section 510 action.[58] Because these are legal remedies, the court in *Midland* concluded that the United States Supreme Court had put its stamp of approval on allowing such remedies for section 510 claims, thereby also allowing enforcement actions to be brought under subsection 502(a)(1)(B).[59]

Given the rest of the *McClendon* opinion, however, such a conclusion requires a leap in logic. First, the sentence that the court relied on must be read in context. The Texas Supreme Court had stated that ERISA actions were concerned only with lost pension benefits.[60] The sentence immediately preceding the *Midland* court's quote states "there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek 'pension benefits.' "[61] The Court in *McClendon* may have been merely emphasizing that in contrast to limiting ER-

52. McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69, 71 (Tex. 1989).
53. *Id.*
54. *Id.*
55. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 136 (1990).
56. International Union v. Midland Steel Prod. Co., 771 F. Supp. 860, 864 (N.D. Ohio 1991).
57. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 145 (1990).
58. International Union v. Midland Steel Prod. Co., 771 F. Supp. 860, 863-64 (N.D. Ohio 1991).
59. *Id.* at 864. The court could not conclude that legal relief is available under § 502(a)(3) because the explicit language in that subsection limits recovery to an injunction or other "equitable" relief. *See infra* text accompanying note 153.
60. McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69, 71 n.3 (Tex. 1989).
61. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 145 (1990).

ISA's coverage to pension plan benefits, a variety of remedies, including an injunction, reinstatement, lost benefits, and restoration of seniority are available for section 510 violations—not necessarily those specifically listed in the case. The Court could have better chosen its words, but it probably did not consider the broad reading that lower courts would give to its words.

In *Midland*, the court took the words in *McClendon* literally.[62] The sentence relied upon, however, appears at the very end of the Court's opinion and is not part of its primary argument for allowing preemption.[63] The sentence is dicta and should not be regarded as the gospel on the availability of specific, legal remedies for section 510 claims.

Moreover, as discussed previously,[64] one of the primary arguments supporting the Court's preemption decision in *McClendon* focused on ERISA's civil enforcement mechanism—subsection 502(a).[65] *McClendon* specifically dealt with section 510 and the Court focused not only on subsection 502(a)(3) as the appropriate enforcement mechanism for such actions, but also referred to subsection 502(e)(1) which limits subsection 502(a)(3) jurisdiction to the federal courts.[66] The Court held only that section 510 claims are *not* within a state court's jurisdiction.[67] The Court did not discuss or even cite subsection 502(a)(1)(B). If section 510 claims are allowed under subsection 502(a)(1)(B), then subsection 502(e)(1) would have allowed state court jurisdiction.[68] This is obviously not the case. The Court's holding in *McClendon* actually supports the argument that section 510 actions may only be brought under subsection 502(a)(3).[69]

In addition to relying on one sentence in the *McClendon* opinion, the court in *Midland* focused on ERISA's legislative history to support its conclusion that Congress implicitly provided a right to jury trial.[70] The court, however, discussed only one remark from the conference committee report.[71] The report stated that all civil actions "in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of

62. International Union v. Midland Steel Prod. Co., 771 F. Supp. 860, 864 (N.D. Ohio 1991).
63. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 145 (1990).
64. *See supra* text accompanying notes 26-27.
65. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 143 (1990).
66. *Id.*
67. *Id.* at 145.
68. Section 502(e)(1) grants exclusive jurisdiction to the federal courts *except* when an action is brought under § 502(a)(1)(B). Actions under § 502(a)(1)(B) may be brought in either state or federal court. *See* 29 U.S.C. § 1132(e)(1) (1988).
69. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 145 (1990).
70. International Union v. Midland Steel Prod. Co., 771 F. Supp. 860, 863 (N.D. Ohio 1991).
71. *Id.*

the Labor Management Relations Act of 1947."[72] The court in *Midland* interpreted the report's remark by relying on a recent United States Supreme Court decision, *Chauffeurs, Teamsters & Helpers, Local 391 v. Terry*[73]—a Seventh Amendment case.[74]

In *Terry*, the Supreme Court held that a right to jury trial existed under the Seventh Amendment when a plaintiff brought a breach of duty of fair representation claim under LMRA section 301.[75] However the court's reliance, in *Midland*, on a 1990 case to interpret the intent of the 1974 Congress is highly unusual. The key to determining whether Congress implicitly provided a right to a jury trial is dependent upon its intent at the time ERISA was passed, not events that occurred subsequent to the Act's passage. Presumably, the 1974 Congress did not have a crystal ball into which it gazed to determine that a breach of the duty of fair representation suit would entitle parties to a jury trial under the Seventh Amendment. Moreover, the Supreme Court specifically stated that the LMRA did not explicitly or implicitly provide for the right to jury trial.[76] For this reason, the Supreme Court had to address the constitutional issue instead of merely relying on the LMRA statutory language.[77] The idea that the 1974 Congress considered such a result under the Seventh Amendment and, therefore, implicitly provided a right to jury trial under ERISA section 510 is difficult to believe.

In addition, a closer look at LMRA section 301 and remarks made by legislators shows that the 1974 Congress merely intended that certain suits under ERISA section 502 be governed by federal law, not state law.[78] The analogy between ERISA and the LMRA has been limited to preemption cases because ERISA's legislative history does not provide any indication that Congress intended to supply procedural specifics, like the right to jury trial, for such actions. In *Mid-*

72. H.R. REP. No. 1280, 93d Cong., 2d Sess. *reprinted in* 1974 U.S.C.C.A.N. 5038, 5107, *and in* 3 SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT ACT OF 1974, at 4277, 4594 (1976).

73. 494 U.S. 558 (1990).

74. International Union v. Midland Steel Prod. Co., 771 F. Supp. 860, 863 (N.D. Ohio 1991).

75. Chauffeurs, Teamsters & Helpers, Local 391 v. Terry, 494 U.S. 558, 573 (1990).

76. *Id.* at 565 n.3.

77. *Id.* at 564-65.

78. 29 U.S.C. § 185 (1988). Indeed, Senator Javits, one of ERISA's primary sponsors, emphasized that courts would need to develop "a body of Federal substantive law." 120 CONG. REC. 29,942 (1974). *See also* Haeffele v. Hercules Inc., 703 F. Supp. 326, 329 (D. Del. 1989) (stating that reference to LMRA merely indicates that ERISA provisions should be governed by federal common law); Note, *The Right to Jury Trial in Enforcement Actions Under Section 502(a)(1)(B) of ERISA*, 96 HARV. L. REV. 737, 741 n.35, 742 (1983) (discussing other similar remarks made by ERISA sponsors).

land, the court's reliance on one conference committee report remark[79] that is anything but clear does not support its conclusion that Congress intended to provide an implicit right to jury trial.

Since the *Midland* decision in 1991, numerous other courts have discussed the Supreme Court's dicta in *McClendon* and reached differing conclusions. This post-*McClendon* confusion exhibited by the lower courts has touched not only cases involving claims brought under ERISA section 510, but also those brought directly under subsection 502(a) for denial of benefits. The cases dealing with the existence of a right to trial by jury in subsection 502(a) benefits claims are relevant to a discussion of the right to a jury trial in a section 510 claim because both types of claims share the enforcement mechanism in subsection 502(a).

In *Steeples v. Time Insurance Co.*,[80] the district court held that employees were entitled to a jury trial on their subsection 502(a)(1)(B) claim for failure to pay benefits on a medical policy.[81] Although *Steeples* concerned an employer's alleged failure to pay insurance benefits, the court relied on the district court opinions in *Vicinanzo v. Brunschwig & Fils, Inc.*,[82] and *Weber v. Jacobs Manufacturing Co.*,[83] cases brought under section 510 for wrongful interference with benefits, to reach its holding that ERISA subsection 502(a)(1)(B) provides a right to jury trial.[84]

More recently, the district court in *Roberts v. Thorn Apple Valley, Inc.*[85] sought to interpret the Supreme Court's *McClendon* dicta in deciding whether an ERISA section 510 claim could support an award of punitive damages.[86] The court in *Roberts* concluded that the Court's language in *McClendon* was simply "responding to the Texas Supreme Court's conclusion that a claim for relief for wrongful discharge does not fall under ERISA."[87] In other words,

79. H.R. REP. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 5038, 5107, *and in* 3 SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT ACT OF 1974, at 4277, 4594 (1976).

80. 139 F.R.D. 688 (N.D. Okla. 1991).

81. *Id.* at 694.

82. 739 F. Supp. 882 (S.D.N.Y. 1990).

83. 751 F. Supp. 21 (D. Conn. 1990).

84. 139 F.R.D. 688, 694 (N.D. Okla. 1991).

85. 784 F. Supp. 1538 (D. Utah 1992).

86. *Id.* at 1540-41. The question of whether punitive damages are available for section 510 claims based on wrongful interference with benefits is an issue that is closely related to the right to jury trial question. Both issues depend upon an interpretation of the remedies provided by Congress in ERISA § 502(a) and the Supreme Court's statement in *McClendon* concerning the "relief requested." Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 145 (1990).

87. 784 F. Supp. 1538, 1541 (D. Utah 1992).

> an employee who is wrongfully discharged by an employer seeking to avoid paying pension benefits may not sue under state law, but may maintain a claim under ERISA. However, the remedy available to such a plaintiff is limited by ERISA's exclusive remedy provision and thus does not allow an award of punitive damages.[88]

Like *Roberts*, the district courts in *Sprague v. General Motors Corp.*[89] and *Pegg v. General Motors Corp.*[90] concluded that the Supreme Court's dicta in *McClendon* was not meant as a suggestion by the Court that an action under ERISA could be an action at law with an attendant right to jury trial.[91] In these two actions for payment of benefits, the courts concluded that it was clear that the relief available under ERISA was strictly equitable in nature,[92] despite arguments made by the plaintiffs that their claims were actually legal.

In both *Sprague* and *Pegg*, the courts relied on the Sixth Circuit's opinion in *Bair v. General Motors Corp.*[93] to reach their conclusions concerning the equitable nature of remedies available under ERISA.[94] In *Sprague*, the court noted that in *Bair* it was held that an action for ERISA benefits is "one at equity, not at law,"[95] even where issues of contract law were involved in the plaintiff's claims. This was in spite of earlier language by the Supreme Court in *Firestone Tire and Rubber Co. v. Bruch*[96] where the Court noted that actions challenging a denial of employment benefits prior to the enactment of ERISA were governed by principles of contract law,[97] and that breach of contract claims have traditionally been considered legal in nature.[98]

Courts in post-*McClendon* cases involving claims for violation of ERISA section 510 certainly have struggled with the interpretation of the Court's dicta, but most recently have tended to conclude that no right to a jury trial is provided. For example, in the Ninth Circuit's recent *Spinelli v. Gaughan*[99] decision, the court thoroughly considered

88. *Id.*
89. 804 F. Supp. 931 (E.D. Mich. 1992) (involving class action by retirees based upon employer's reduction of health care benefits).
90. 793 F. Supp. 284 (D. Kan. 1992) (involving action under ERISA § 502(a)(1)(B) for benefits due an employee).
91. Sprague v. General Motors Co., 804 F. Supp. 931, 936-37 (E.D. Mich. 1992); Pegg v. General Motors Co., 793 F. Supp. 284, 285-86 (D. Kan. 1992).
92. Sprague v. General Motors Co., 804 F. Supp. 931, 937 (E.D. Mich. 1992); Pegg v. General Motors Co., 793 F. Supp. 284, 286 (D. Kan. 1992).
93. 895 F.2d 1094 (6th Cir. 1990). The court in *Bair* expressly rejected an argument by the plaintiff in that case that a jury trial right remains when relief is sought under § 502(a)(1)(B) as opposed to § 502(a)(3). *Id.* at 1096.
94. Sprague v. General Motors Corp., 804 F. Supp. 931, 934-35 (E.D. Mich. 1992); Pegg v. General Motors Corp., 793 F. Supp. 284, 286-87 (D. Kan. 1992).
95. Sprague v. General Motors Corp., 804 F. Supp. 931, 935 (E.D. Mich. 1992).
96. 489 U.S. 101 (1989).
97. *Id.* at 112.
98. *Id.*
99. 12 F.3d 853 (9th Cir. 1993).

whether the plaintiff would have a right to trial by jury on her section 510 claim for wrongful discharge. Specifically, the court addressed whether Supreme Court cases decided since *McClendon* clarify the existence or non-existence of such a right.[100] The *Spinelli* court concluded that the nature of the remedy provided by Congress in section 502 is solely equitable.[101] The court wrote that the language in the statute is "clear enough,"[102] but that the Supreme Court removed any remaining doubt in its *Mertens v. Hewitt Associates*[103] decision.

In *Mertens*, the Supreme Court held that damages are not available for a violation of subsection 502(a)(3)[104] because the text of ERISA leaves no doubt that Congress intended that only traditional forms of equitable relief be available. *Mertens* was not a section 510 case, but was a case brought by plan participants alleging that the plan's actuary had caused losses. In analyzing the effect of *Mertens*, the court in *Spinelli* noted:

> Prior to *Mertens*, language at the very end of *Ingersoll-Rand Co. v. McClendon* could possibly have been read as allowing federal courts to award compensatory and punitive damages under section 502(a)(3), both of which are normally considered legal remedies. We must deem this language, which was unnecessary to the result in *Ingersoll-Rand* in any event, superseded by *Mertens*.[105]

Although in *Spinelli* the court concluded that a section 510 claim could be classified as legal in nature, the court ultimately held that the nature of the remedy is more important than the nature of the right in determining whether a right to jury trial exists[106] unless Congress lacked the power to limit the remedy available.[107]

The court found neither the Seventh Amendment[108] nor other Supreme Court jurisprudence to be a bar to Congress' creating a cause of action for which only equitable relief is available.[109] The court rejected the plaintiff's argument that Congress was attempting to transform an otherwise legal claim into an equitable one by statutory fiat.[110] The court concluded that the rights provided by Congress in ERISA are not a mere "repackaging of existing rights."[111] The court wrote:

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100. *Id.* at 857 & n.3.
101. *Id.* at 857.
102. *Id.*
103. 113 S. Ct. 2063 (1993).
104. *Id.* at 2064-65.
105. Spinelli v. Gaughan, 12 F.3d 853, 857 n.3 (9th Cir. 1993) (citations omitted).
106. *Id.* at 857. The court further noted that the Supreme Court has repeatedly stated that the nature of the remedy is dispositive when the two conflict. *Id.*
107. *Id.*
108. *Id.* See *infra* text accompanying notes 119-171 for a complete discussion of the constitutional inquiry into a right to jury trial.
109. Spinelli v. Gaughan, 12 F.3d 853, 857-58 (9th Cir. 1993).
110. *Id.*
111. *Id.* at 857.

> The right of an employee not to be discharged for exercising rights under ERISA has no precursor under federal law; the Seventh Amendment does not speak to whether a new cause of action must be legal or equitable. Insofar as section 510 displaces existing rights available under state law—as it well may—it does not merely relabel those rights by calling them equitable while leaving in place their essentially legal character. By limiting the remedies to those available in equity, Congress has changed what the dispute is about.[112]

The result reached in *Spinelli* is directly contrary to *McDonald v. Artcraft Electric Supply Co.*,[113] an earlier decision from the District of Columbia where a district court concluded that even if Congress had intended to eliminate the right to a jury trial, it did not have the constitutional authority to do so.[114] The court based its conclusion on the plaintiff's desire for legal relief on his ERISA section 510 discharge claim, as well as the fact-intensive nature of the dispute.[115] In *McDonald*, the court stated that *McClendon* provided support for the view that Congress intended to provide a right to trial by jury in ERISA cases seeking compensatory damages, as well as the view that a jury trial was constitutionally mandated.[116]

In light of the Supreme Court's holding in *Mertens*, however, the court's conclusion in *Spinelli* is much more persuasive than the conclusion in *McDonald*.

Even assuming that subsection 502(a)(1)(B) may be used to enforce section 510 and that *McClendon* does not suggest the exclusive use of subsection 502(a)(3), not all courts agree that subsection 502(a)(1)(B) actions are necessarily legal in nature.[117] Further, even if some actions are legal in nature, that does not automatically require a finding that Congress implicitly provided a right to jury trial.

In fact, the trend appears to be against finding a right to trial by jury in the statute.[118] Because no right to a jury trial is implicitly or

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112. *Id.* at 857-58.
113. 774 F. Supp. 29 (D.D.C. 1991).
114. *Id.* at 36.
115. *Id.*
116. *Id.* at 35.
117. For examples of cases holding that no right to a jury trial attaches under § 502(a)(1)(B), see Blake v. Unionmutual Stock Life Ins. Co. of Am., 906 F.2d 1525 (11th Cir. 1990); Cox v. Keystone Carbon Co., 894 F.2d 647 (3d Cir.) (Cox II), *cert. denied*, 498 U.S. 811 (1990); *In re* Vorpahl, 695 F.2d 318 (8th Cir. 1982); Calamia v. Spivey, 632 F.2d 1235 (5th Cir. 1980); Wardle v. Central States, S.E. & S.W. Areas Pension Fund, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981).

    For examples of cases holding that a right to jury trial does exist, see Gangitano v. NN Investors Life Ins. Co., 733 F. Supp. 342 (S.D. Fla. 1990); Stamps v. Michigan Teamsters Joint Council No. 43, 431 F. Supp. 745 (E.D. Mich. 1977).

    For opinions that have been interpreted to allow a jury trial depending on the remedy requested, see Katsaros v. Cody, 744 F.2d 270 (2d Cir.), *cert. denied*, 469 U.S. 1072 (1984); Steeples v. Time Ins. Co., 139 F.R.D. 688 (N.D. Okla. 1991).
118. *See, e.g.*, Spinelli v. Gaughan, 12 F.3d 853, 857-58 (9th Cir. 1993).

explicitly provided for in an ERISA section 510 claim, courts cannot avoid the Seventh Amendment constitutional issue.

III. THE CONSTITUTIONAL ANALYSIS

The Seventh Amendment to the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[119] The United States Supreme Court has held that statutory rights created by Congress are included within the Seventh Amendment's scope.[120] The Seventh Amendment right to jury trial, however, applies only to suits in which legal rights are to be ascertained and not to suits of equity or admiralty.[121]

Under present Seventh Amendment doctrine, a section 510 action may be considered a common-law suit if it involves "rights and remedies of the sort typically enforced in an action at law."[122] There are four possible ways that rights and remedies might be paired in a statutory action.[123]

First, when legal rights are paired with legal remedies, the cause of action is a pure action at law and the right to a jury trial attaches.[124] Second, when equitable rights are enforced by equitable remedies, it is a pure equity suit and no right to a jury trial exists.[125]

Third, when legal rights are combined with an equitable remedy, the cause of action is considered equitable and no right to a jury trial arises.[126] For example, in 1974 the United States Supreme Court distinguished Title VII claims from Title VIII claims and implied that Title VII employment discrimination suits are not triable to a jury because even though the substantive right is legal, the remedy is equitable.[127] Conversely, the Court held that Title VIII fair housing suits were triable to a jury because Congress had provided both a legal right and a legal remedy.[128]

Fourth, when equitable rights are combined with a legal remedy, the outcome is the most difficult to predict. One publication has suggested that the suit should be considered equitable and that no right

119. U.S. Const. amend. VII.
120. *See* Curtis v. Loether, 415 U.S. 189, 194 (1974).
121. *See id.* at 193.
122. *See id.* at 195.
123. *See* Note, *supra* note 78, at 747.
124. *See id.*
125. *See id.*
126. *See id.* at 747-48. *See also* Spinelli v. Gaughan, 12 F.3d 853, 857-58 (9th Cir. 1993) (stating that where the nature of the remedy and the nature of the right conflict, the equitable nature of the relief is dispositive).
127. *See* Note, *supra* note 78, at 747-48 (construing Curtis v. Loether, 415 U.S. 189, 196-97 (1974)).
128. Curtis v. Loether, 415 U.S. 189, 195 (1974).

to jury trial attaches.[129] On the other hand, the United States Supreme Court's current trend is to allow a right to jury trial whenever a legal remedy is present.[130]

In *Ross v. Bernhard*,[131] the United States Supreme Court enunciated a three-part test for determining whether the rights and remedies of an action should be characterized as legal or equitable. The test requires an examination of (1) the pre-merger custom with reference to the legal nature of the issue in question, (2) the nature of the remedy sought, and (3) the practical abilities and limitations of a jury.[132] An ERISA action certainly seems to be within the practical abilities and limitations of a jury.[133] Consequently, the first two prongs of the *Ross* test will determine if a right to jury trial attaches under the Seventh Amendment: (1) whether an analogous pre-merger cause of action was generally a legal or equitable claim, and (2) whether the remedies available for a section 510 claim are equitable or legal in nature.

A. Pre-Merger Custom

The pre-merger custom prong of the *Ross v. Bernhard* test examines the treatment of actions prior to the merger of law and equity under the Federal Rules of Civil Procedure. The United States Supreme Court has recognized that this examination requires "extensive and possibly abstruse historical inquiry."[134] Despite Justice

129. *See* Note, *supra* note 78, at 748 (1983).

130. *See, e.g.*, Chauffeurs, Teamsters & Helpers, Local 391 v. Terry, 494 U.S. 558, 573-74 (1990); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 n.4 (1989).

131. 396 U.S. 531 (1970), *rev'g* 403 F.2d 909 (2d Cir. 1968).

132. *Id.* at 538 n.10.

133. Recently, the United States Supreme Court has focused on the first two parts of the test. In fact, the United States Supreme Court has not used the practical limitations of a jury as an independent basis for extending the right to a jury trial under the Seventh Amendment. *See* Tull v. United States, 481 U.S. 412, 418 n.4 (1987), *rev'g* 769 F.2d 182 (4th Cir. 1985). In Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989), the Court noted that this consideration is relevant when determining "whether Congress has permissibly entrusted the resolution of certain disputes to an administrative agency or specialized court of equity, and whether jury trials would impair the functioning of the legislative scheme." *Id.* at 42 n.4.

Even assuming the third prong of the test is still viable, ERISA § 510 actions are within a jury's ability. There is nothing particularly difficult or cumbersome in their resolution. Additionally, the resolution of such actions has not been entrusted to an administrative agency or specialized court of equity. The third prong of the *Bernhard* test, therefore, does not play a role in this determination.

134. Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970), *rev'g* 403 F.2d 909 (2d Cir. 1968).

Brennan's call to "simplify" this prong of the test,[135] the Court has continued to look to pre-merger custom for guidance.[136]

When Congress provides a statutory right, the inquiry can be even more difficult because no exactly analogous common-law right may have existed[137] and courts generally disagree in their characterization of statutory rights. Some courts have held that an ERISA section 510 action is most closely analogous to a breach of contract, wrongful discharge claim.[138] The right may also be compared with the tort-based public policy wrongful discharge claim.[139] On the other hand, the Third Circuit has stated that a section 510 claim might be analogous to a tortious interference with benefits claim.[140] Under these possibilities, the common-law analogue would either be a contract or tort claim. Both were generally considered legal in nature if the remedy sought was legal, but were considered equitable in nature if the remedy sought was equitable.[141]

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135. *See* Chauffeurs, Teamsters & Helpers, Local 391 v. Terry, 494 U.S. 558, 574-81 (1990) (Brennan, J., concurring).

136. *See id.* at 564-70, 581-91 (discussing and relying on the particular pre-merger custom that the majority, concurring justice, and dissent believe is most relevant). *See also* Tull v. United States, 481 U.S. 412, 418-21 (1990), *rev'g* 769 F.2d 182 (4th Cir. 1985) (holding that the action is clearly analogous to the 18th century action in debt).

137. Pre-merger custom is not the only appropriate analogy. See *infra* text accompanying notes 138-146 for discussion of analogies to modern common-law claims.

138. *See* International Union v. Midland Steel Prod. Co., 771 F. Supp. 860, 863 (N.D. Ohio 1991) (holding that the jury trial right is implicitly provided under the statute in addition to the right provided by the Seventh Amendment); Weber v. Jacobs Mfg. Co., 751 F. Supp. 21, 25 (D. Conn. 1990) (finding that the right attaches under the Seventh Amendment); Vicinanzo v. Brunschwig & Fils, Inc., 739 F. Supp. 882, 885 (S.D.N.Y. 1990) (finding that ERISA implicitly provides the right to a jury trial in addition to the right provided under the Seventh Amendment involving mixed questions of law and fact).

139. *See, e.g.*, Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 136 (1990), *rev'g* 779 S.W.2d 69 (Tex. 1989) (holding that the state common-law action was preempted by section 510, but recognizing the Texas Supreme Court had held that the claim alleged could be brought as a public policy wrongful discharge action).

140. Cox v. Keystone Carbon Co. (Cox II), 894 F.2d 647, 650 (3d Cir.), *cert. denied*, 498 U.S. 811 (1990). In *Cox II*, the court characterized a section 510 claim as one for benefits under a plan. *Id.* Subsection 502(a)(1)(B)'s first clause—providing a claimant with an action to recover benefits due under the terms of the plan—would apply for enforcement, and no right to a jury trial would attach because the claim is considered equitable in nature. *Id.* The court rejected the argument that the second clause of § 502(a)(1)(B)—providing a claimant with an action to enforce rights provided under the terms of the plan—applied, because there are certain rights, as opposed to benefits, that can be provided under a plan separate and distinct from the recovery of benefits. *Id.* The appeal process that must be incorporated into the plan itself is an example of a right that would arise under the plan. *Id.* Conversely, § 510 rights are not usually provided by a plan; the rights arise under the Act. *See id.*

141. The split among courts trying to determine what statute of limitations applies to an ERISA section 510 claim is a further indication of the disagreement that re-

Beyond analogies to eighteenth century pre-merger actions, courts may also consider whether the claim at issue is analogous to any common-law claim known today.[142] In *Spinelli v. Gaughan*,[143] the Ninth Circuit Court of Appeals noted that analogizing to pre-merger claims is not the only way to classify an action as legal or equitable. The court found an appropriate analogy to the plaintiff's section 510 claim in the modern tort of retaliatory discharge, "a tort so widely accepted in American jurisdictions today [the court was] confident it has become part of our evolving common law."[144] The tort of retaliatory discharge is recognized as legal in nature.[145] As such, the court considered Spinelli's claim to be legal, and avoided "rattling through dusty attics of ancient writs"[146] in search of an analogous pre-merger claim.

Assuming no analogy to the right in question provides a clear answer, the second prong of the *Ross v. Bernhard* test—the nature of the remedy—will determine whether a Seventh Amendment jury trial right exists. If the remedy available is legal in nature, then a right to jury trial attaches. If the remedy is equitable, however, no right to a jury trial arises under the Seventh Amendment.

B. Nature of the Remedies

As discussed previously, subsection 502(a)(3) should be regarded as the sole mechanism for enforcing a section 510 claim.[147] Subsection 502(a)(3)'s language clearly indicates that it applies to violations of "this subchapter" or the terms of a plan.[148] Subsection 502(a)(1)(B), however, refers only to benefits or rights arising under the terms of a plan.[149] The jurisdictional mechanisms[150] and remedial provisions[151]

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sults when courts attempt to analogize section 510 claims to other claims. Some courts have held that section 510 claims for benefits are contractual in nature; therefore, the statute of limitations applied to contract claims in that state is appropriate. *See, e.g.*, Held v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197, 1206-07 (10th Cir. 1990) (holding that New York's six-year limitation period applied to an action for recovery of pension benefits).

Other courts, however, have held that section 510 claims are more analogous to employment discrimination claims or wrongful discharge claims, and, thus, the statute of limitations for those actions should apply. *See, e.g.*, McClure v. Zoecon, Inc., 936 F.2d 777, 778 (5th Cir. 1991) (noting that section 510 proscribes specified acts of "discharge" and "discrimination").

142. *See* Spinelli v. Gaughan, 12 F.3d 853, 856 (9th Cir. 1993).
143. *Id.*
144. *Id.* at 857.
145. *Id.*
146. *Id.*
147. *See supra* text accompanying notes 21-37.
148. 29 U.S.C. § 1132(a)(3) (1988).
149. *Id.* § 1132(a)(1)(B).
150. *See supra* text accompanying notes 29-32.
151. *See supra* text accompanying notes 33-34.

of each section indicate that Congress thought carefully about the language in each section and how that section would be used to enforce rights under the Act. Moreover, the United States Supreme Court's holding in *Ingersoll-Rand Co. v. McClendon* limits enforcement of section 510 claims to subsection 502(a)(3).[152]

Assuming that subsection 502(a)(3) is the only enforcement mechanism for section 510, the remedies available for a violation are plainly limited to those that are equitable in nature. Subsection 502(a)(3) provides that a violative act or practice may be enjoined or "other appropriate equitable relief" may be awarded.[153] An injunction is clearly an equitable remedy, and any other remedy available under subsection 502(a)(3) has been specifically characterized as "equitable relief." Based on the section's plain language regarding equitable relief, the Seventh Amendment does not provide a right to jury trial.

The United States Supreme Court, however, has not determined conclusively what relief may be awarded when a section 510 plaintiff prevails.[154] Dicta in the *McClendon* case indicates that the Court

152. *See supra* text accompanying notes 32 & 65.

153. 29 U.S.C. § 1132(a)(3) (1988).

154. Other courts' awards have varied and included injunctive relief, backpay, reinstatement, compensatory damages, and punitive damages. *See, e.g.*, Cox v. Keystone Carbon Co., 861 F.2d 390, 394 (3d Cir. 1988) (Cox I) (remanding case to determine whether employee was entitled to the recovery of benefits under the plan), *appeal after remand*, 894 F.2d 647 (Cox II), *cert. denied*, 498 U.S. 811 (1990); International Union v. Midland Steel Prod. Co., 771 F. Supp. 860, 865 (N.D. Ohio 1991) (permitting a right to a jury trial to determine whether plaintiff could recover compensatory damages and retirement health coverage benefits); Blue Cross & Blue Shield v. Lewis, 753 F. Supp. 345, 347 (N.D. Ala. 1990) (recognizing recovery of "tort-like" damages); Weber v. Jacobs Mfg. Co., 751 F. Supp. 21 (D. Conn. 1990) (allowing jury trial to determine whether plaintiff could recover backpay, lost employee benefits, reinstatement, restoration of seniority, and compensatory damages); Vicinanzo v. Brunschwig & Fils, Inc., 739 F. Supp. 882, 883 (S.D.N.Y. 1990) (stating that in the absence of a stipulation by the parties, plaintiffs could have sued for a sum certain, and had they prevailed, they could have recovered an indefinite number of subsequent judgments for future medical care); Tucker v. Montgomery Ward & Co., No. 86-C-9734, 1987 U.S. Dist. LEXIS 6737, (N.D. Ill. July 17, 1987) (stating that only equitable relief is available, but not defining what it intended to include as equitable relief); Brill v. Central States, S.E. & S.W. Areas Pension Fund, No. 82-C-7973, 1986 U.S. Dist. LEXIS (N.D. Ill. July 31, 1986) (stating that only equitable relief is available but including no further definitions).

Recently, courts have almost uniformly held that punitive damages and other extra-contractual damages are not available in actions for violations of ERISA § 510. *See infra* text accompanying notes 169-171.

The courts, however, have not agreed upon the base issue of whether or not § 502(a)(3) or 502(a)(1)(B) may be used to enforce a § 510 claim. If the courts had agreed that only § 502(a)(3) applied, the plain language of that subsection makes it difficult to see how they could award compensatory and punitive damages as "other equitable relief." These cases, therefore, cannot be used to conclusively say that the relief available for a § 510 claim is equitable or legal in nature.

might allow legal relief even though the Court clearly indicated that subsection 502(a)(3) is the appropriate enforcement mechanism for a section 510 claim.[155] The *McClendon* dicta is in direct conflict with subsection 502(a)(3)'s plain language, and the clear statutory language should prevail over one sentence of dicta in a preemption case opinion.

If the Court were to determine that backpay awards are available under subsection 502(a)(3), its recent *Chauffeurs, Teamsters & Helpers, Local 391 v. Terry*[156] decision would make the conclusion that only equitable relief is available for a violation of section 510 somewhat more difficult, but not impossible. In *Terry*, the plaintiff to a breach of the duty of fair representation claim requested "compensatory damages" in the form of "backpay and benefits."[157] The Court distinguished the type of backpay at issue in *Terry* from other types of equitable damages and held that it was legal in nature.[158]

First, the Court stated that the benefits and backpay sought for the breach of the duty of fair representation were not restitutionary in nature.[159] The Court referenced actions for the disgorgement of improper profits as an example of restitution because the money in question was wrongfully withheld by the defendant.[160] The Court distinguished the backpay at issue in *Terry* as money that would have been received if the defendant had proceeded properly.[161] Under this distinction, backpay in an ERISA section 510 action might be more like the backpay at issue in *Terry* because it is money that would have been received if the defendant had acted properly—had not violated the statute.[162]

In *Terry*, however, the Court also distinguished backpay remedies available under section 706(g) of Title VII from backpay remedies available for a breach of the duty of fair representation.[163] The Court

155. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 143 (1990), *rev'g* 779 S.W.2d 69 (Tex. 1989). *See supra* text accompanying notes 26-28.

156. 494 U.S. 558 (1990).

157. *Id.* at 570.

158. *Id.* at 570-73.

159. *Id.* at 570-71.

160. *Id.* at 570.

161. *Id.* at 571.

162. In *Terry*, the Court also stated that "[a] monetary award 'incidental to or intertwined with injunctive relief' may be equitable." *Id.* This seems to indicate that if the primary goal of the case is to obtain an injunction and as part of the court's injunctive powers it awards backpay, then the backpay award is equitable in nature.

Given the Court's decision in Dairy Queen, Inc. v. Wood, 369 U.S. 469, 470-73 (1962), however, this characterization is not necessarily determinative. The right to a jury trial cannot be abridged merely by characterizing the legal claim as incidental to the equitable relief sought. *See id.* at 472-73 & n.8.

163. Chauffers, Teamsters & Helpers, Local 391 v. Terry, 494 U.S. 558, 571-72 (1990).

noted that Congress had specifically characterized backpay under Title VII as a form of equitable relief.[164] Although the Court limited the scope of what might be characterized as restitutionary in nature, Title VII remedies have been traditionally characterized as restitutionary in nature[165] even though they are not based on a wrongful withholding of money, like a disgorgement of profits. Rather, Title VII backpay is money that would have been received if the defendant had acted properly—had not violated the statute. This is the same characterization applicable to backpay under ERISA. Therefore, the Court's distinction regarding what might be considered restitutionary is somewhat confusing and not determinative of the issue.

The Court also made an interesting and important distinction between Title VII's statutory language and the lack of similar language in the NLRA or LMRA.[166] Congress under Title VII specifically characterized backpay as a form of equitable relief.[167] No such language appears in the NLRA or LMRA. Like Title VII, ERISA subsection 502(a)(3) specifically characterizes the relief available for a section 510 claim as equitable.[168] This similarity supports the conclusion that if backpay is available under subsection 502(a)(3), it is equitable rather than legal in nature.

The body of law concerning the availability of extra-contractual damages in section 510 cases also supports the conclusion that the relief available in a section 510 claim is equitable. Litigated almost as regularly as the right to jury trial issue, the availability of punitive damages and damages for emotional distress has also provided an area of contention for the courts.[169] It has recently become clear, how-

164. *Id.* at 572.
165. *Id.*
166. *Id.* at 572-73.
167. *Id.* at 572.
168. 29 U.S.C. § 1132(a)(3) (1988).
169. Prior to the decision in Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990), *rev'g* 779 S.W.2d 69 (Tex. 1989), every circuit court that had addressed the issue had held that punitive damages are not recoverable under ERISA § 502(a)(3). *See* Harsch v. Eisenberg, 956 F.2d 651, 661 (7th Cir.) (citing Kleinhans v. Lisle Sav. Profit Sharing Trust, 810 F.2d 618, 627 (7th Cir. 1987), *cert. denied*, 113 S. Ct. 61 (1992); Amos v. Blue Cross-Blue Shield, 868 F.2d 430 (11th Cir.), *cert. denied*, 493 U.S. 855 (1989); Pane v. RCA Corp., 868 F.2d 631 (3d Cir. 1989); Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821 (6th Cir.) *cert. denied*, 488 U.S. 909 (1988); Varhala v. Doe, 820 F.2d 809 (6th Cir. 1987); Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enter., Inc., 793 F.2d 1456 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034, *and cert. denied*, 479 U.S. 1089 (1987); Sokol v. Bernstein, 803 F.2d 532 (9th Cir. 1986); Powell v. Chesapeake & Potomac Tel. Co., 780 F.2d 419 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986). These and other decisions holding that extra-contractual damages were not available under ERISA § 502(a)(3) grew out of the Supreme Court's holding in Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985), *rev'g* 722 F.2d 482 (9th Cir. 1983), that "extra-contractual damages caused by improper or un-

ever, that the weight of authority lies against the awarding of punitive and other extra-contractual damages to section 510 plaintiffs.[170] Courts reaching this conclusion have generally done so based on the equitable nature of the remedies intended by Congress.[171]

Because section 510 claims are enforced under subsection 502(a)(3), the plain language of that section and similarity to Title VII indicate that no right to a jury trial attaches under the Seventh Amendment.

IV. CONCLUSION

ERISA provides no explicit right to a jury trial for section 510 claims, either in section 510 or in its enforcement statute, ERISA subsection 502(a). In addition, because ERISA's plain language indicates that section 510 actions should be brought only under subsection 502(a)(3), which provides only equitable relief, no implicit right to a jury trial exists and no Seventh Amendment right to a jury attaches. Subsection 503(a)(1)(B) should not be considered an enforcement mechanism.

Although the right to a jury trial in ERISA section 510 cases continues to be an area of contention for the lower federal courts, recent decisions such as *Spinelli v. Gaughan*[172] and *Mertens v. Hewitt Associates*[173] have begun to clear the murkiness created by the Supreme Court's unfortunate dicta in *Ingersoll-Rand Co. v. McClendon*.[174] Perhaps the time has come when ERISA litigants will be able to avoid rehashing the same arguments regarding the existence of a right to jury trial, and both courts and litigants will accept the premise that the equitable nature of remedies provided in ERISA subsection 502(a)(3) results in trials to the courts on section 510 claims.

The right to a jury trial is an important constitutionally protected right. If, however, as this Article concludes, Congress has only provided for equitable relief, the section 510 action falls outside the Sev-

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timely processing of benefit claims" were not recoverable in an action brought by a beneficiary under ERISA § 409(a), as amended, 29 U.S.C. § 1109(a).

170. *See, e.g.*, Harsch v. Eisenberg, 956 F.2d 651, 661 (7th Cir.), *cert. denied*, 113 S. Ct. 61 (1992); McRae v. Seafarers' Welfare Plan, 920 F.2d 819, 821 (11th Cir.), *rev'g* 726 F. Supp. 817 (S.D. Ala. 1989), *reh'g denied*, 931 F.2d 901 (1991); Roberts v. Thorn Apple Valley, Inc., 784 F. Supp. 1538, 1541 (D. Utah 1992); O'Neil v. Gencorp, Inc., 764 F. Supp. 833, 835 (S.D.N.Y. 1991); Gaskell v. Harvard Co-op. Soc'y, 762 F. Supp. 1539, 1544 (D. Mass. 1991), *vacated on other grounds*, 3 F.3d 495 (1st Cir. 1993).

171. See *supra* text accompanying notes 85-88 for a discussion of the decision in Roberts v. Thorn Apple Valley, Inc., 784 F. Supp. 1538 (D. Utah 1992) in which the court thoroughly considered the punitive damages issue.

172. 12 F.3d 853 (9th Cir. 1993).

173. 113 S. Ct. 2063 (1993).

174. 498 U.S. 133 (1990).

enth Amendment and no right that might need protection exists. Congress constructed the ERISA enforcement provisions with great care. Much thought went into the overall enforcement scheme. The statute should be read literally, and if Congress believes a different result is warranted, it may act to change the enforcement scheme it created.